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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SUPERIOR PROTECTION, INC.,
Petitioner,

v.

N.L.R.B.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the certification by the National Labor Relations Board (the "Board") of a collective bargaining unit of security guards employed by a GSA contractor almost two years following a representation election was an illegal accretion in violation of the National Labor Relations Act, 29. U.S.C. Section 151, *et. seq.* (the "Act"). In this case, a majority of the guards included within the description of the certified unit did not become employed until after the election, when the employer acquired additional locations by successfully bidding on another GSA contract, following which the employees working under both contracts were merged into a single unit.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at 401 F.3d 282 (5th Cir. 2005). The citations of the two Decisions and Orders of the Board are at 341 N.L.R.B No. 35 (2004), and 341 N.L.R.B. No. 86 (2004).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on February 16, 2005. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1) and (5) Unfair labor practices
a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(5) to refuse to bargain collectively with the representatives of his employees....

STATEMENT OF THE CASE

Petitioner, Superior Protection, Inc. ("Superior"), which provides security officers for federal office buildings, seeks review of a decision of the United States Court of Appeals for the Fifth Circuit enforcing a decision and order of the Board ordering Superior to bargain with the United Government Security Officers of America, Local 229 (the "Union").

In October, 2001, the Board held a representation election among a group of Superior Employees in a unit described as including of all its security officers assigned to work at GSA contract facilities in Harris, Montgomery, and Galveston Counties. Houston, Texas, is primarily in Harris County.

At the time the election was held, the General Services Administration (the "GSA") administered (that function is now under the authority of the Department of Homeland Security) two contracts in the Houston, Texas, metropolitan area, covering different federal office locations. Superior was the contractor for only one of the contracts; the one with a smaller number of security guards. The other contractor, for the second GSA contract, employed a significantly larger number of security guards, none of whom were represented by a labor union. The election was a tie, with one disputed challenged ballot, cast by an employee discharged before the election.

In May, 2002, Superior successfully bid on the second GSA contract in the Houston metropolitan area, and, as is customary, employed all of the security guards who

previously had worked for Superior's predecessor. **The Union, on January 13, 2003, filed a petition to represent the employees working under the contract newly acquired by Superior. Processing of this petition was deferred by the Regional Director and is still being held in abeyance by the Board. There is no indication that it will ever be processed.**

After prolonged litigation, on July 31, 2003, the Board ordered that the employee who cast the challenged ballot be reinstated with back pay, and that the challenged ballot be opened and counted. The Regional Director opened the challenged ballot, which was for the Union, giving the Union a bare majority, and certified the Union as the bargaining agent for all guards within the entire geographical unit (i.e., continuing with the same unit description despite the inclusion of the new group of guards working under the second contract).

Despite objections from Superior, the Board proceeded, on or about February 25, 2004, to ratify the certification of the Union as the exclusive bargaining representative for the described unit, without changing the description of the unit to exclude the majority of employees covered under the original description, who had not voted in the election. Under the Board certification, the employees working under **both** GSA contracts are now included in the bargaining unit as described above, since they **all** now work for Superior at GSA contract facilities in Harris, Montgomery, and Galveston counties. The Court of Appeals for the Fifth Circuit subsequently enforced that Decision and Order of the Board, on July 26, 2004.

Superior tested the certification by refusing to recognize or bargain with the Union, because (among other reasons not asserted here) recognizing the Union as the exclusive bargaining representative for the unit as described in the certification would have the effect of illegally accreting the larger number of employees in the recently acquired group working under the second GSA contract, into the smaller group of employees working under the first GSA contract who had voted for the Union by a one vote margin in the election. The certification of the unit as previously described had effected an accretion of a larger, unrepresented group of employees into a smaller group who alone had voted in the election, a clear violation of long-established law, cited in detail in the opinion of the Court of Appeals. See, *e.g., Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979).

In its decision ordering Superior to bargain with the Union, the Board stated that if there had been a merger of the two units of employees, the result could have been different. Superior, in a motion for reconsideration, notified the Board that in the interval between the Superior acquisition of the second contract with the larger number of guards, and the issuance of the Board's bargaining order, the employees working under the two contracts had, in fact, gradually become merged. The Board denied Superior's motion for reconsideration, stating that the merger information should have been presented to the Board earlier, although no investigation had been conducted by the Board.

The decision of the Court of Appeals which is the subject of this petition enforced the decision of the Board accreting the larger group into the smaller group.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit opinion in this case sanctions such a far departure by the Board from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Specifically, the reasoning of the Board, which was adopted by the Fifth Circuit, in certifying a unit of employees which clearly accretes the larger number of previously unrepresented security guards who did not have the opportunity to express their desires in a representation election into the smaller group which voted for the Union in an election, is specious, as is shown by the last paragraph of the Fifth Circuit opinion:

> ...Superior devotes considerable ink to a proposition that appears to present a nearly insurmountable obstacle to a [B]oard finding of accretion–namely, that the new security employees (of which there are 42) outnumber the existing unit employees (of which there are 29).(FN14) *See, e.g., Carr-Gottstein Foods Co.*, 307 N.L.R.B.1318(1992)('When the unrepresented group sought to be accreted numerically overshadows the existing unit, the [B]oard will not accrete the larger number of unrepresented employees without giving them a chance to express their representational desires'). In fact, in rejecting Superior's accretion argument, the Board recognized that 'accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees that existed at the time of the

> election.' Thus, should the union alter its current course and eventually seek to accrete the new employees to the existing unit, Superior can raise this numerical objection among others in that proceeding. 401 F.3d at p. 290.

The Fifth Circuit court justifies this position in reliance on a very dubious proposition:

> There is no basis in the record warranting the conclusion that the union is attempting to accrete the new employees at the additional facilities to the certified unit. To the contrary, as the Board observed, while the representation petition was pending before the Board, the union filed a separate representation petition seeking to be certified as the exclusive collective bargaining representative of the new employees at the additional facilities as a *separate* and *distinct* bargaining unit. In fact, the union's representation petition expressly classified the scope of the proposed unit as including "[a]ll sites *other* than locations in" the instant representation proceeding. (Emphasis added.)Because the union has not sought to accrete the new employees into the existing unit, Superior's reliance on *Renaissance Ctr. P'ship*, 239 N.L.R.B. 1247 (1979) is misplaced. 401 F.3d at p. 289.

As noted above, the Union petition to hold an

election among the new employees in the larger group, filed on January 13, 2003, **over two years ago**, has never been processed. In any event, now that the merger has occurred, there is no way to separate the employees in the once separate and distinct units. How will it be possible for the Union to represent only those employees who voted in the election, when they are integrated within the entire Houston region?

The Fifth Circuit has now issued a mandate enforcing a Board Decision and Order ordering Superior to bargain with the Union regarding a unit described as including all security guards under both contracts. If allowed to stand, the effect will be that the Union will be the exclusive bargaining representative of a group of employees, the majority of whom had no opportunity to express their desire to be so represented. This is a clear violation of our national labor policy and of the requirement of the National Labor Relations Act for majority determination of representation. There is no way, after the merger, to distinguish between the two groups of employees, who already had been, prior to the certification, transferred and inextricably intertwined among the various locations covered by the two GSA contracts now held by Superior. The certification is defective and Superior should not be required to bargain with a minority union. Accordingly, certiorari should be granted, and upon hearing, the decision of the Fifth Circuit should be reversed.